# NEW YORK STATE ASSOCIATION OF SCHOOL PERSONNEL ADMINISTRATORS

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**EVALUATION AND DISCIPLINE OF SCHOOL DISTRICT EMPLOYEES**

[Conducting Workplace Investigations]
Education Law Section 3020-a
Civil Service Law Section 75
A BASIC PRIMER

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## I. Evaluation of District Employees

A. The “Golden Rule” for a successful discipline case is to be as factual and specific as possible and:

*** DOCUMENT - DOCUMENT - DOCUMENT***

B. Evaluations

1. Why do them?

a. Collective Bargaining Agreement. Required by law for all educationally certified employees and APPR required for many teachers and principals. May be required by contract for support staff employees. If the requirement exists, do them. However, if you do them, you must do them honestly and completely.

b. Discipline Hearing - Needed to show:

-Prior Notice of concerns and opportunity to improve / Remediation / Just Cause / Progressive Discipline requirements

c. Morale.

- Consistency of treatment
- "Reward" for good employees
- No way to use compensation as incentive

d. Discourage Discrimination/Wrongful Discharge Claims/Defense - an accurate record of work problems rebuts a claim of discrimination

C. Evaluation Tools and Process

1. The Counseling Letter [***Note:*** Not a Reprimand]. The tool of preference for all administrators!!

a. Always include as many specific facts as possible regarding the following:

(1) When the incident happened.

(2) Where the incident happened.

(3) Exactly what happened.

(4) Who was involved.

(5) What was wrong about what occurred.

(6) What must be done immediately pertaining to the specific incident and how the employee should handle such incidents in the future.

(7) What assistance, resource or counseling are available to the employee; remediation plans and goals.

(8) What the consequences are if such an incident occurs again.

(9) **Test is whether a stranger (e.g. hearing officer) reading the letter a year or more later will know what happened, why it was wrong and what were the District's expectations.**

b. Counseling Session with Employee - Issues:

(1) Advance Written Notice to Employee which sets forth right of employee to be represented by a union representative (even if not a "right", it is preferred).

(2) Location/Attendees (have a witness with you particularly if there is a union representative present).

(3) Explain the Process.

(4) Give Constructive Criticism.

(5) Listen, the employee may say something useful to your counseling letter.

c. Sample Letters **attached**.

2. Performance Evaluations (non-APPR and support staff).

a. Should be conducted by a direct supervisor(s) with personal knowledge of:

(1) Job requirements of employees.

(2) Employee's performance.

(3) Can be collaborative between joint supervisors.

b. Performance evaluations should accomplish the following:

(1) Provide notice to employees of:

(a) Work achievements AND deficiencies.

(b) Future expectations

(2) Highlight specific examples of strengths and weaknesses.

c. Performance evaluations can, if appropriate, measure objective criteria such as: Quantity of work and absences/lateness.

d. Documentation.

(1) Explain deficiencies, performance standards and consequences for failing to meet those performance standards.

(2) Provide sufficient detail when documenting concerns.

- May attach documents

(3) Always place documentation in personnel file and note this on the document.

e. Employee response may be permitted under a collective bargaining agreement.

(1) Employee may be permitted to agree or disagree with the evaluation in writing.

(2) An employee response should be placed in his/her personnel file attached to the evaluation.

(3) Employee may also have a right to a specific time period to correct a deficiency.

f. Consistent application of criteria by all evaluators to all members of the group is crucial.

(1) Monitor each department or supervisor's evaluations to ensure consistency throughout the District.

(2) Consistency may help the District avoid adverse impact discrimination claims.

g. Teacher/Principal Improvement Plans - Evaluations (particularly under APPR) may trigger need for a TIP/PIP as the remediation effort required when poor performance is noted on an evaluation (e.g. a rating of "developing" or "ineffective" under APPR). However, TIP's may be used even if not indicated by an APPR. Improvement plans are also a very effective tool for support staff employees in many cases.

(1) Remediation is an active process to improve the employee's behavior.

(2) Remediation can include such things as peer intervention (e.g. mentors), employee assistance programs, action plans, lesson plan reviews, increased formal and informal observations, required or suggested in-service courses, etc.

(3) Remediation should include active participation by supervisors throughout the process in monitoring and assisting employees to reach goals.

(4) They need to have a written conclusion or end to the process after a reasonable period of time to demonstrate improvement.

## II. Investigating Employee Misconduct

A. General Guidelines

1. Conduct thorough and prompt investigation.

2. Do not presume guilt. Be open-minded.

3. Apply an objective third-party point of view.

4. Take the complaint seriously.

5. Set professional tone for the interview and try to put witnesses at ease.

6. Gather facts; don't make judgments. Get answers to: who, what, when, where, how and why.

B. Who Conducts The investigation?

-Administrator
-Private Investigator
-Attorney
-Police Involvement

C. Confidentiality - **Don't Promise!!**

D. Interviewing Witnesses

1. Make no promises re: action to be taken.

2. Although not legally required, you may want to obtain parental consent/involvement when interviewing students about investigations of employees.

3. Conduct individual not group interviews.

4. Make no statements about accused's character, job performance, etc.

5. Determine what complainant wants.

6. Document complaint/**Obtain and Preserve any Evidence** - e.g., written complaint, written statements, tape recordings, photographs, examples of poor work, communication to employees, emails, computer usage data, video recordings (e.g. security

cameras), etc. The advance of video and other electronic sources of evidence and social media have greatly assisted employers in pursuing employee misconduct cases. However, the evidence **MUST BE PRESERVED!** Be aware of automatic over-recording which can occur on computer systems and video systems. Such evidence is needed for your hearing and may be required to be preserved for any court proceeding. Get screen shots of any social media that you intend to use.

7. Notice to accused employee and opportunity to respond is PART of the investigation, not an after-thought.

8. What to do with a witness who refuses to cooperate.

E. Interviewing employee who may reasonably be the potential subject of disciplinary action

1. Right to union representation.

a. Statutes - Both Education Law Section 3020-a and Civil Service Law Section 75 require that the employee be made aware of the right to union representation in any meeting/interview which could reasonably result in discipline in <u>writing</u> prior to the meeting. Err on the side of providing notice. The law allows for the employee to have the meeting re-scheduled if union representation is requested but not available. This adjournment must be reasonable but is not required to be unlimited.

b. Collective Bargaining Agreements - May also often have procedural protections. Check them. Do not lose evidence by failing to follow a procedural issue.

2. Conducting the interview.

a. The purpose of the interview is to provide the employee with "Notice and an Opportunity to be Heard" regarding the allegations. This is a constitutionally based requirement known as “minimal due process”.

b. You may choose to not disclose identity of complainant(s). However, you may have to do so in order to meaningfully confront the employee.

3. Refusal to answer questions - Do not force. Under Education Law Section 3020-a, the employee has the “right to remain silent”. Under CSL Section 75, you may be able to force but not worth it.

## III. Employee Discipline Under Education Law §3020-a

A. General Procedures

1. Filing of charges against tenured employee.

a. tenured employees may not be disciplined or discharged except for **just cause** (Education Law §3020).

b. Grounds for disciplining or discharging tenured employees (found in Education Law § 3012):

(1) insubordination, immoral character or conduct unbecoming a teacher,

(2) inefficiency, incompetency, physical or mental disability, or neglect of duty

(3) failure to maintain certification

c. Charges must be in writing and may be made by the superintendent of schools or anyone else.

d. Charges must be filed with the clerk or secretary of the school district or employing board during the period between the actual opening and closing of the school year for which the tenured employee is normally required to serve (teachers vs. administrators).

e. Statute of Limitation - No charges shall be brought more than three (3) years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. "Just Cause" Standard - 7 Step Test, as a **guide** only not a legal requirement.

a. Did the Employer provide the Employee with forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

b. Was the Employer's rule or the managerial order reasonably related to the orderly, efficient, and safe operation of the Employer's business?

c. Did the Employer, before administering discipline, make an

effort to discover whether the Employee actually did violate or disobey a rule or order?

d. Was the Employer's investigation conducted fairly and objectively?

e. During the investigation, did the Employer obtain substantial evidence or proof of the Employee's guilt?

f. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination?

g. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the Employee's proven offense and (b) the record of the Employee in his/her service with the Employer?

3. Disposition of Charges.

a. The employing board, in executive session, shall determine, by a majority vote, whether probable cause exists to bring a disciplinary proceeding against the employee pursuant to Section 3020-a.

b. If probable cause is found, the district clerk must immediately forward the following information, in writing, to the employee by certified or registered mail, return receipt requested or by personal delivery:

(1) a statement specifying the charges in detail,

(2) the maximum penalty which will be imposed by the board if the employee does not request a hearing or that will be sought by the board if the employee is found guilty of the charges after a hearing, and

(3) an outline of the employee's statutory rights (SED form).

4. Electronic filing of Charges and related documents

a. School Districts are required to upload documents related to the 3020-a hearing via SED’s TEACH online system.

(1) generally, districts have had access to TEACH as a personnel tool used with respect to fingerprinting

clearance and background checks

(2) districts will need a designated administrator or administrative support person (e.g. the District Clerk) who will have access to TEACH, will be responsible for uploading various documents, and will be in communicate with SED via e-mail

(3) law firms and attorneys representing school district's will also use TEACH, and may also be responsible for uploading certain documents (e.g., pre-hearing motions)

b. TEACH primarily serves as a case management tool

(1) electronic filing will take the place of correspondence between the parties with SED in many cases

(2) employees subject to discipline under 3020-a will have cases open in the TEACH system using their name

(3) hearing officer selection is conducted via TEACH

(4) TEACH provides a "clock" that can be used to track the status of the case (i.e., days remaining to complete case within the required 155 day time frame)

5. Suspension pending hearing.

a. The employee may be suspended with pay pending a hearing on the charges and a final determination thereof.

b. The suspension may only be without pay if the charges are for lack of certification or if the employee has entered a guilty plea to or has been convicted of a felony crime concerning the criminal sale or possession of a controlled substance, a precursor of a controlled substance, or drug paraphernalia, or a felony crime involving the physical or sexual abuse of a minor or student or if sole basis of charges is lack of certification. [Note: a tenured employee may be terminated without a hearing if he/she is convicted of certain sex offenses (largely although not exclusively those dealing with minors)].

6. Employee's right to a hearing.

   a. Within ten (10) days of receipt of the statement of charges, the employee shall notify the district clerk in writing whether or not (s)he desires a hearing on the charges. All charges will be heard by a single hearing officer. The clerk must forward the request for a hearing (along with some other information) to SED within three (3) days of receipt of this request. The unexcused failure of the employee to notify the clerk or secretary of his or her desire for a hearing within 10 days of the receipt of charges shall be deemed a waiver of the right to a hearing.

   b. If the employee waives his or her right to a hearing, the board shall proceed, within (15) days of the waiver, by a majority vote, to determine the case and fix a penalty, if any, to be imposed.

7. Selection of a hearing officer or panel.

   a. Process conducted using the TEACH system

   b. The hearing officer is mutually selected from a list provided by the state education department within fifteen (15) days of receiving the list. Failure to select a hearing officer will result in the Commissioner designating the hearing officer from that same list.

8. Pre-hearing Conference.

   a. Within ten to fifteen (10-15 days) of being appointed, the hearing officer shall hold a pre-hearing conference at which the hearing officer has the power to:

      (1) issue subpoenas

      (2) hear and decide all motions, including but not limited to motions to dismiss the charges

      (3) hear and decide all applications for bills of particular or requests for production of materials or information, including, but not limited to, witness statement(s), investigatory statement(s), note(s), exculpatory evidence or any other evidence, including district or student records, relevant and material to the

employee's defense. **School districts are now entitled to discovery as well.**

(4) establish hearing dates which shall be consecutive and shall not be postponed absent good cause.

(5) **New expedited hearing rules** became effective for any charges filed on or after April 1, 2012. In essence, the new procedures require the hearing to be completed and decision rendered within **155 days (about 5 months)** of the preferral of the charges (i.e. the date the Board votes probable cause). These new time requirements are strict and have resulted in more efficient and less costly hearings. They also mean that the District needs to be ready to proceed when the charges are voted upon by the Board.

9. Hearing.

a. Hearings may be private or public at the discretion of the employee.

b. The employee shall have the right to:

(1) a reasonable opportunity to defend him/herself.

(2) an opportunity to testify on his/her own behalf, however the employee cannot be required to testify.

(3) representation by counsel.

(4) to subpoena and cross-examine witnesses.

c. All testimony shall be taken under oath and shall be transcribed by a stenographer.

d. Compliance with the technical rules of evidence is not required.

10. Post hearing procedures.

a. The hearing officer shall render a written decision within thirty (30) days of the last hearing day, or in the case of an expedited hearing, within ten (10) days of the conclusion of the expedited hearing.

b. The written decision must include:

(1) findings of fact on each charge

(2) his/her conclusions with regard to each charge based on the findings

(3) a statement as to what penalty, if any, shall be imposed by the board.

c. Progressive Discipline Requirement - At the request of the employee, the hearing officer may consider the extent to which the board made effort to correct the behavior of the employee which resulted in the charges, including:

(1) remediation

(2) peer intervention

(3) employee assistance plan.

d. Penalties available to the hearing officer are:

(1) written reprimand

(2) monetary fine

(3) suspension without pay for a fixed period

(4) dismissal

(5) remedial action, including but not limited to:

(a) leaves of absence without pay

(b) continuing education and/or study

(c) counseling or medical treatment

(d) any other remedial action or combination thereof.

e. Within **fifteen (15) days** of receipt of the hearing officer's decision, the board must implement the decision.

11. Appeal.

a. No later than **ten (10) days** after receipt of the hearing officer's decision [NOTE: this is shorter than the above 15 day action time period], the employee or the board may make an application to the New York State Supreme Court to vacate or modify the decision of the hearing officer pursuant to Article 75 of the Civil Practice Law and Rules.

b. The court's review is limited to the following grounds for vacating the award:

(1) findings of corruption, fraud or misconduct in procuring the award,

(2) partiality of the hearing officer,

(3) hearing officer exceeded his/her power (e.g. decision contrary to public policy), or

(4) failure of the hearing officer to issue a final and definite award.

c. an appeal will not delay or stay the implementation of the hearing officer's decision.

12. Standard Employee Defenses.

a. The lack of "cause" defense.

b. Procedural defenses (primarily in CBA such as supervisor failed to timely notify or evaluate).

c. The lack of "notice" defense (“I did not know I could not do that”).

d. The lack of "help" defense (“I tried but no one helped me or showed me how to do it”).

e. The personality conflict defense (“My supervisor does not like me”).

f. The selective prosecution/discipline defense (“Everyone else does this and it is okay”).

g. Failure to follow APPR or evaluate at all or all my

evaluations are great.

B. Primary Challenges/Hurdles Under Existing Law

1. Availability of Acceptable Hearing Officers - The few hearing officers acceptable to both sides are understandably busy. Therefore, obtaining quick hearing dates, let alone consecutive hearing dates, is very difficult. Many experienced hearing officers refuse to take 3020a cases under the new expedited rules and given the fact that the State is late in paying them. **It is a broken hearing officer system.**

2. Requirement of Suspension With Pay - In the vast majority of cases, the employee is suspended with pay pending the hearing. With the employee on paid suspension, there is little incentive for the employee or employee's counsel to expedite matters. While suspension without pay would be preferred, at least some period of suspension without pay (such as occurs with Civil Service Law Section 75) would be helpful.

C. The Significant 2015 Changes:

1. Violent Felony Convictions

a. The Commissioner of Education ("Commissioner") will automatically revoke and annul an individual's teaching certificate upon a conviction for any "violent felony offense or offenses committed against a child when such child was the intended victim of such offense." Education Law §305. For this purpose, a "violent felony offense" includes any Class B, C, D or E violent felony offense as defined in Penal Law §70.02(1), such as persistent sexual abuse of a child.

b. However, if such individual's conviction is set aside on appeal (or otherwise reversed, vacated or annulled), or it is determined that he or she is not the same person as the convicted offender, and the Commissioner reinstates the teacher's certification, then the individual ***must*** be reinstated to his or her position within the school district.

c. In such case, the reinstated individual will be entitled to full back pay and benefits from the date that his or her teaching certificate was revoked or annulled.

2. Changes to Section 3020-a Hearings

a. Suspensions without Pay: Where charges of "misconduct constituting physical or sexual abuse of a student" are brought on or after July 1, 2015, the school board may suspend the employee ***without*** pay pending an

expedited hearing under Section 3020-a(3)(c)(i-a). However, such a suspension without pay includes ***only*** employee compensation, ***cannot*** include "other benefits and guarantees," and ***cannot*** last longer than 120 days from the date of the board's decision to suspend the employee without pay.

b. "Probable Cause" Hearings:

   i. The Commissioner is to establish a process in regulations for a "probable cause hearing" before a Hearing Officer within 10 days to determine whether the decision to suspend an employee without pay should be continued or reversed. *Id*., §3020-a(2)(c).

   ii. The Hearing Officer selection process must be "as similar as possible" to the process for appointing Hearing Officers for special education due process complaints under Education Law §4404.

   iii. Once appointed, the Hearing Officer will determine whether probable cause supports the charges.

   iv. If the Hearing Officer finds that probable cause does ***not*** support the charges, the Hearing Officer shall reverse the school board's decision to suspend the employee without pay and shall reinstate such pay.

   v. In addition, the Hearing Officer ***may*** reinstate pay upon a written determination that a suspension without pay is "grossly disproportionate in light of all surrounding circumstances."

   vi. Moreover, if the Hearing Officer finds in favor of the employee (either at the probable cause hearing or in a final determination after an expedited hearing), the employee shall be eligible to receive reimbursement for withheld pay and accrued interest at a rate of six percent compounded annually.

c. Discovery by the Employer: At the pre-hearing conference prior to a Section 3020-a hearing, the Hearing Officer shall set a "schedule and manner for full and fair disclosure of the witnesses and evidence to be offered by the employee." *Id*., §3020-a(3)(c)(i)(C).

d. Child Witnesses: Under the following three conditions, a Hearing Officer ***may*** permit a child witness who is less than 14 years old to testify through the use of live, two-way closed-circuit television pursuant to Criminal Procedure Law §65.00(4):

   i. The Hearing Officer must provide the employee with an opportunity

to be heard;

ii. Second, the Hearing Officer must determine by "clear and convincing evidence" that such child witness would "suffer serious mental or emotional harm" that would "substantially impair such child's ability to communicate" if he or she were required to testify at the hearing without the use of such closed-circuit television; and

iii. The Hearing Officer must determine that the use of such closed-circuit television "will diminish the likelihood or extent of such harm." In making this determination, the Hearing Officer must also consider any applicable factors set forth in N.Y. Criminal Procedure Law §65.20(10), including whether, at the time of the alleged offense, the defendant occupied a position of authority with respect to the child witness.

iv. Whenever a Hearing Officer allows a child witness to testify through the use of closed-circuit television, the process must be consistent with the special testimonial procedures set forth in N.Y. Criminal Procedure Law §65.30.

e. Expedited Hearings for Abusing Children: Where charges of misconduct constituting physical or sexual abuse of a student are brought, the hearing shall be conducted before a single Hearing Officer in an expedited hearing. This expedited hearing must commence within seven days after the pre-hearing conference, and must be completed within 60 days after the pre-hearing conference. Hearing Officers must "strictly follow" the statutory time periods for conducting expedited Section 3020-a hearings. Failure to adhere to these time periods shall be grounds for the Commissioner to exclude such individual from the list of potential Hearing Officers.

f. At the pre-hearing conference, the Hearing Officer must establish a hearing schedule in order to:

i. Ensure that the expedited hearing is completed within the required timeframes; and
ii. Ensure an equitable distribution of days between the charged employee and school board.

g. Generally, no adjournments may be granted that would extend the hearing beyond 60 days. However, upon request, the Hearing Officer may grant a "limited and time specific adjournment" that would extend the hearing beyond 60 days if the Hearing Officer determines that the delay is attributable to a "circumstance or occurrence substantially beyond the control of the requesting party," ***and*** an "injustice would result if the

adjournment were not granted."

h. Regarding penalty, in exercising his or her discretion regarding penalty, the Hearing Officer "shall give serious consideration" to the penalty recommended by the employing school board. *Id*. If the Hearing Officer rejects the school board's recommended penalty, then such rejection "must be based on reasons based upon the record as expressed in a written determination."

3. Streamlined Removal Procedures for Teachers Rated "Ineffective" Under APPR

a. *Section 3020-b Replaced the Previous Process for Expedited Hearings*: the new law included a new Education Law §3020-b, which sought to help school districts remove teachers and principals who receive consecutive "ineffective" APPR ratings under *either* Section 3012-c *or* 3012-d.

b. The new streamlined removal process under Section 3020-b *replaced* the existing expedited hearing process for incompetence charges based on a "pattern of ineffective teaching or performance" consisting of two consecutive "ineffective" APPR ratings under Section 3020-a(3)(c)(i-a).

c. Of course, even if a teacher does not receive two consecutive "ineffective" APPR ratings, districts may still bring incompetence charges under Section 3020-a for other reasons.

d. Are Incompetence Charges for "Ineffective" APPR Ratings Optional or Mandatory?

i. A school district "***may***" bring incompetence charges under Section 3020-b against any classroom teacher or building principal who receives ***two*** consecutive "ineffective" APPR ratings

ii. By contrast, a district "***shall***" (i.e., must) bring incompetence charges under Section 3020-b against any classroom teacher or building principal who receives ***three*** consecutive "ineffective" APPR ratings.

e. In the case of charges against a tenured employee who received two consecutive "ineffective" APPR ratings, the written charges shall also allege that the employing school board "has developed and substantially implemented a teacher or principal improvement plan ("TIP" or "PIP") in accordance with either Section 3012-c or Section 3012-d for the employee following the first APPR evaluation in which the employee was rated "ineffective," and the "immediately preceding" APPR evaluation if the employee was rated "developing."

f. Hearing Officer Selection:

i. In cases involving employees who received three consecutive "ineffective" APPR ratings, the Commissioner will directly appoint a Hearing Officer from the list provided by AAA.

ii. In cases involving employees who received two consecutive "ineffective" APPR ratings, the Commissioner will send a copy of the Hearing Officer list and biographical information from AAA simultaneously to the employee and employing school board ("parties").

iii. The Commissioner will also include information about each potential Hearing Officer's record in the last five cases of commencing and completing hearings within the statutory time periods.

iv. The Commissioner will appoint an Hearing Officer from the list if the parties fail to agree or fail to notify the Commissioner of their selection in a timely manner.

g. Pre-Hearing Conferences: The pre-hearing conference is where the Hearing Officer shall have the power to issue subpoenas, hear motions and decide on other discovery and evidentiary issues. At such pre-hearing conference, the IHO shall establish a hearing schedule to ensure that the hearing is completed within the required time period and to ensure an equitable distribution of days between the employing school board and the charged employee.

h. Adherence to Statutory Time Periods:

i. The Commissioner has enacted Regulations ensuring that the duration of a removal proceeding pursuant under Section 3020-b (as measured from the date an employee requests a hearing to the final hearing date) is ***no*** longer than 90 days for employees who received two consecutive "ineffective" APPR ratings.

ii. In the case of employees who received three consecutive "ineffective" APPR ratings, such Regulations will ensure that the duration of the removal proceeding is ***no*** longer than 30 days.

i. Compliance Monitoring: SED is authorized to monitor and investigate an IHO's compliance with applicable regulations and the statutory timelines. IHOs must "strictly follow" the statutory time periods for conducting Section 3020-b hearings. The failure to do so shall be grounds for the Commissioner to exclude such individual from the list of potential IHOs.

An IHO's continued failure to commence and complete Section 3020-b hearings within the statutory time periods shall be considered grounds for exclusion from the list of potential IHOs.

j. Hearing Record: An accurate record of each Section 3020-b hearing shall be kept at SED expense in accordance with the Commissioner's Regulations. A copy of the record shall be furnished without charge to the parties upon request. SED is authorized to utilize any new technology or such other appropriate means to transcribe or record such hearings in an accurate, reliable, efficient and cost-effective manner without charge to the parties.

4. Legal Standards of Evidence for Section 3020-b Hearings

a. The new Section 3020-b process sets two new legal standards based on whether the tenured employee received two or three consecutive "ineffective" APPR ratings.

b. *Two Consecutive "Ineffective" APPR Ratings*:

i. Two consecutive APPR ratings of "ineffective" in accordance with Section 3012-c or 3012-d "shall constitute prima facie evidence of incompetence that can be overcome ***only* by clear and convincing evidence that the employee is *not* incompetent in light of all surrounding circumstances**." *Id*., §3020-b(3)(c)(v)(A)(emphasis added).

ii. If such prima facie evidence is ***not*** overcome, then the finding – absent extraordinary circumstances – shall be deemed "just cause for removal." *Id*.

c. *Three Consecutive "Ineffective" APPR Ratings*:

i. Three consecutive APPR ratings of "ineffective" in accordance with Section 3012-c or 3012-d "shall constitute prima facie evidence of incompetence that can be overcome ***only* by clear and convincing evidence that the *calculation* of one or more of the teacher's or principal's underlying components on the [APPRs] pursuant to [Section 3012-c or 3012-d] was *fraudulent***." *Id*., (emphasis added).

ii. If such prima facie evidence is ***not*** overcome, then the finding – absent extraordinary circumstances – shall be deemed "just cause for removal." *Id*. For this purpose, "fraud" shall include "mistaken identity."

## IV. Employee Discipline Under Civil Service Law §75

A. Procedures

1. Section 75 applies to "removal and other disciplinary action" concerning **certain** classifications of civil service employees for incompetence and/or misconduct.

   a. The "discipline" specified under Section 75 is limited to one of the following (Note the age of these):

      (1) a reprimand

      (2) a fine not to exceed one hundred dollars

      (3) a suspension without pay for a period not exceeding two months

         • If the Board suspends an employee for thirty days pending a hearing and determination of the charges, the period of suspension without pay may be considered as part of the penalty

      (4) demotion in grade and title, or

      (5) dismissal

      (6) ***Note*****:** in settlement agreements, different types of discipline may be combined or altered, e.g., letter of reprimand and period of suspension without pay or a longer period of suspension without pay

2. Covered Employees.

   a. Section 75 applies, if at all, only to members of the District's non-instructional staff in the following categories:

      (1) A person holding a position by permanent appointment in the competitive class of the classified civil service (e.g., custodians), or

      (2) A person holding a position by permanent appointment or employment in the classified service of the State... in the public school service, who is honorably discharged or released from the armed forces of the United States having served therein as

such member in time of war...or who is an exempt volunteer fire fighter...or,

(3) An employee holding a position in the non-competitive class or labor class other than a position designated in the rules of the State of Municipal Service Commission as confidential or requiring the performance of functions influencing policy, who since his last entry into service has completed at least five years of continuous service. (e.g., bus driver with over five years of continuous service to the District).

b. Section 75 does not apply to teachers, administrators, or other exempt personnel.

c. NOTE: A collective bargaining agreement may provide Section 75 coverage to additional employees or at an earlier time.

3. Statute of Limitation - Under Section 75, the Board may not commence a removal or disciplinary proceeding more than eighteen (18) months after the complained of conduct, unless the conduct would, if proven in a court of law, constitute a crime.

B. Review of Applicable Collective Bargaining Provisions.

1. A collective bargaining unit may provide an alternative to or supplement Section 75. Thus, when considering disciplinary action against a non-instructional employee, the collective bargaining agreement between the District and the non-teaching unit **must** first be reviewed to determine whether there is a provision specifically governing discipline and/or discharge of unit members.

2. For example, some agreements provide section 75 protection to all non-instructional employees, regardless of their classification or length of service, and other agreements grant employees contractual protection under a "just cause" provision they may not be entitled to under Section 75.

3. When there is no provision in the collective bargaining agreement explicitly waiving, supplementing, or modifying the protection of Section 75 (such as a "just cause" clause), then Section 75 is the relevant provision regarding Civil Service employees if it applies to that employee.

4. Note, even if the collective bargaining agreement does not directly

affect or apply to the discipline of non-teaching employees, it could have an indirect effect, where, for example, negative performance evaluations or counseling memos were not properly placed in an employee's personnel file.

C. Application of Section 75

1. Interrogation.

a. A covered employee has the right to union representation during questioning if (s)he is a potential subject of disciplinary action, and must receive written notification of this right in advance of any questioning.

b. If the employee fails to obtain representation within a reasonable time, the employer has the right to then question the employee without representation.

c. If a hearing officer finds the District unreasonably questioned the employee without representation, then any and all statements obtained during questioning, as well as any evidence or information obtained as a result of the improper questioning shall be excluded. The District and the unit may, in a collectively bargained agreement, agree to waive this procedure.

2. The District must provide the employee with written notice of the proposed disciplinary actions and the charges against him/her. The employee can be charged with either incompetence or misconduct.

3. The employee is then allowed at least eight calendar days to answer the charges in writing.

4. The Board, because it is vested with the authority to remove or discipline the employee, is required to hold a hearing, or the Board may designate in writing the appointment of a person to hold the required hearing. ***NOTE: There is growing legislative interest in changing Section 75 to look more like Section 3020a in that hearing officers will be mutually selected and their decisions will be binding.***

5. There is no time frame during which the hearing must be held once charges are filed against an employee. However, an employee may only be suspended without pay for 30 days, so it is advisable to hold the hearing within the 30-day period.

6. The District bears the burden of proving the charged incompetence or misconduct. Compliance with technical rules of evidence is not required.

7. The employee's prior disciplinary record may only be submitted for the purposes of determining penalty, not whether the employee is guilty of the charged conduct. The employee must receive notice of such review and be permitted to respond.

8. If a person is designated by the Board to hold the hearing, he/she is vested with all the powers of the Board, and shall make a record of the hearing which shall, together with his/her recommendations, be referred to the Board for its review and decision.

9. The recommendation of the hearing officer is advisory only and can be accepted, rejected, or modified by the Board based only on its review of the record.

10. Employee's Rights at the hearing:

    a. An employee against whom charges have been preferred is entitled at the hearing to be represented by counsel or by a representative of the recognized certified employee organization.

    b. The charged employee is also allowed to summon witnesses in his own behalf.

11. Pending the hearing and determination of charges of incompetency or misconduct, the employee against whom the charges have been preferred may be suspended without pay for a period not exceeding thirty (30) days. An employee is entitled to "notice and opportunity to respond" prior to any suspension without pay.

12. If the Board finds an employee not guilty of any charges, that employee must then be restored to his position with full pay for any period of suspension less any unemployment insurance benefits the employee may have received during that period.

13. Should the employee be found guilty by the Board of the charged misconduct or incompetence, then one copy of the charges, the transcript of the hearing, the employee's answer, and the determination must be filed with the local Civil Service Commission. This has the practical effect of hindering the employee's chances for other civil service employment.

D. Appeals from a Section 75 determination

1. Civil Service Law Section 76 provides an appeal process for an employee who is aggrieved by a penalty or punishment imposed pursuant to Section 75.

2. The process of appeal can be either by:

   a. Application to the State or municipal commission having jurisdiction, or

   b. An application to the Court pursuant to Article 78 of the Civil Practice Law and Rules.

3. On appeal the District's decision will be examined to determine whether all of the procedures of Section 75 were complied with and if the findings of guilt are supported by **"substantial evidence"**.

4. In addition, the penalty imposed will be reviewed. However, the penalty will generally only be modified if it is **"grossly disproportionate to the offense (s) or shocking to the conscience."**

E. Pitfalls/Issues to Consider

1. Actions which do <u>not</u> trigger the protection of Section 75.

   (a) Letters/memorandum of counseling (i.e., Evaluations).

   (b) Withholding of pay for an unauthorized absence (i.e., "Docking").

2. Probationary Employees.

   (a) Different rules apply to probationary non-instructional employees, both competitive and non-competitive, based upon the rules of the applicable local civil service commission. Procedures for disciplining/terminating probationary employees are oftentimes detailed in those local rules.

   (b) Districts are typically required to provide a probationary employee with notification that his/her probationary period will be terminated and an opportunity to appear before the appointing authority (the board of education) prior to actual termination.

## V CONCLUSION

Effective documentation of employee incompetency and misconduct can and will result in serious penalties up to dismissal under the law. The processes are challenging but should not dissuade supervisors from doing the work to document poor work performance and recommending the discipline and termination of employees.